Supreme Court, U.S.
FILED

D41870 MAY 9 1995

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK A. MARULLO, JR., ET AL.
PETITIONERS

VERSUS

NOEL PATRICK CASSANOVA, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the petitioners are entitled to qualified immunity to a lawsuit brought by a fired at-will government employee who engaged in activity beyond the scope of his duties, activity directly at odds with his supervisor's wishes, and activity which under existing law constitutes lawful grounds for termination, and who then pleads these facts in his Complaint so that the objective reasonableness of his discharge is established on the face of the Complaint, even though the Complaint also contains allegations of retaliatory intent.

II. Whether specific allegations that (1) state judges "acted under the color of state law", (2) in an official "administrative" capacity when they, (3) infringed upon a constitutional right held by a state employee through wrongful termination is sufficient to give rise to a consideration of qualified immunity such that the affirmative defense thereof could be said to appear on the face of the Complaint for purposes of a pre-answer Rule 12(b)(6) motion.

LIST OF PARTIES

Defendants–Petitioners

The Honorable Frank A. Marullo, Jr.
The Honorable James F. McKay, III
The Honorable Dennis J. Waldron
The Honorable Morris Reed
The Honorable Gerard J. Hansen
The Honorable Patrick Quinlan
The Honorable Calvin Johnson
The Honorable Frank Shea

Plaintiffs–Respondents

Noel Patrick Cassanova
Karen Sullivan Cassanova

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of the petitioners' Motion To Dismiss on grounds of qualified immunity, dated February 9, 1995, of which the review of this Honorable Court is now sought is contained in the Appendix as Document 1. It is unreported.

The Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated June 2, 1994, denying the petitioners' Motion To Dismiss on grounds of qualified immunity is contained in the Appendix as Document 2. It is unreported.

The Complaint, as amended, is contained in the Appendix as Document 3.

JURISDICTION AND THE REASONS FOR THE EXERCISE THEREOF

The Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit was entered on February 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

This Petition For Writ Of Certiorari presents the question of whether the petitioners, eight judges of the Criminal District Court for the Parish of Orleans, State of Louisiana, are entitled to qualified immunity in this lawsuit to the 42 U.S.C. §1983 claims, which are based primarily on the plaintiffs'/respondents' allegation that by terminating the respondent's employment, the judges/defendants/petitioners violated the respondent's constitutional right to free speech.

Petitioners respectfully submit that, given the facts of this case as pleaded in the Complaint, they are entitled to

qualified immunity as a matter of law, because they could have reasonably believed that their termination of the respondent was lawful. The ruling of the Court of Appeal has in effect reinstated subjective state of mind as a factor relevant to the consideration of qualified immunity. This Court specifically eliminated subjective state of mind as a factor relevant to the consideration of qualified immunity in Harlow v. Fitzgerald, 457 U.S. 800, 817–818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

Petitioners respectfully submit that in ruling that the petitioners were not entitled to the defense of qualified immunity given the facts of this case as pleaded in the Complaint, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Hence, petitioners respectfully request that this Honorable Court exercise its discretion and take up the issue of whether the subjective state of mind of a governmental employer in discharging an employee is to be considered in determining whether that governmental employer is entitled to qualified immunity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the entitlement of the petitioners to qualified immunity from a lawsuit arising from their termination of a governmental employee. The defense of qualified immunity is jurisprudential. Hence, there is no constitutional or statutory provision which specifically sets out this defense.

Other constitutional and statutory provisions relevant to the issue raised by this Petition are as follows:

U.S. Const. amend. I

U.S. Const. amend. XIV
42 U.S.C. §1983
La. C.C. art. 2747
La. C.Cr.Proc. art. 404.1
La. C.Cr.Proc. art. 404.
La. R.S. 15:111

The text of these provisions, or relevant portions of the text, is contained in the Appendix as Document 4.

STATEMENT OF THE CASE

Facts

(1) Introduction and Nature of the Case

For the purpose of this Petition for Writ of Certiorari, this is a Section 1983 case involving alleged deprivation of constitutional rights as a result of what the plaintiff/respondent asserts to be retaliatory termination of his employment with the Board of Jury Commissioners of Orleans Parish. The defendants/petitioners are all judges of the Criminal District Court for the Parish of Orleans.

The position held by the plaintiff/respondent, Mr. Cassanova, prior to his termination was that of Secretary of the Board of Jury Commissioners for the Parish of Orleans. (Complaint, Appendix document 3 ¶4.)[1] The position is provided by statute, La. R.S. 15:111, and Mr. Cassanova was

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[1]Since the facts of this case for purposes of this Petition for Writ of Certiorari are established solely by the Cassanova's Complaint. The Complaint, as amended, has been attached hereto as Appendix Document 3.

employed by the Board upon recommendation from Governor Edwin W. Edwards. (Complaint, Appendix Document 3, ¶¶ 6–7.) Mr. Cassanova held this position until he was removed by the Judges after a majority vote in an en banc session. The named defendants herein are the same Judges who voted in favor of Mr. Cassanova's termination. (Complaint, Appendix Document 3, ¶ 27.)

(2) The Board of Jury Commissioners and the Nature of Mr. Cassanova's Employment

The Board of Jury Commissioners is a statutorily created body consisting of five members (commissioners) whose duties are, in essence, to insure the effective operation of jury selection and maintenance of the general venire. In Orleans Parish, the commissioners themselves are "appointed by the Governor, subject to confirmation of the Senate, to serve at his [the Governor's] pleasure." La.C.Cr.P. 404.1(A). The requirements for qualification to serve as a jury commissioner are set forth in Article 401 of the Code of Criminal Procedure and, although Mr. Cassanova as Secretary of the Board is required to possess these qualifications, he is not appointed as a commissioner. Mr. Cassanova is an employee of the Board elected by the commissioners to aid in the operation of the commission. The position of "Secretary" is a salaried position, La. R.S. 15:111, which is for no fixed term.

(3) The Activities of Mr. Cassanova while Employed by the Board

Although La.C.Cr.Proc. art. 404.1 specifically transfers the accounting function of the Board to the Judicial Administrator for the Criminal District Court, Mr. Cassanova's first action was to demand from the Judicial

Administrator all of the accounting documents. (Complaint, Appendix Document 3, ¶ 8.) Although Mr. Cassanova, as Secretary, is hired by the Board subject to supervision of the Court, and the Governor's office has no statutory control or direction over the position held by Mr. Cassanova, Mr. Cassanova candidly admits in his Complaint that he was acting at the request and advice of the Governor's Executive Counsel in determining his job duties. (Complaint, Appendix Document 3, ¶ 7.)

Mr. Cassanova was denied the right to obtain control of the records. (Complaint, Appendix Document 3, ¶ 8.) After release of the accounting functions was denied, Mr. Cassanova once again candidly admits reporting these actions directly to the Governor's Executive Counsel, (Complaint, Appendix Document 3, ¶ 10) for the purposes of seeking guidance as to further actions.

Upon the advice of the Governor's Executive Counsel, Mr. Cassanova once again renewed his request for access to the entire accounting documentation. (Complaint, Appendix Document 3, ¶ 13.) While the Judges voted to provide Mr. Cassanova with a copy of the budget, (see Complaint, Appendix Document 3, ¶ 13), to aid in his preparation of the plan of operation, Mr. Cassanova was still not satisfied with a majority ruling of the Judges, his supervisors, and conveyed the results of the meeting once again to the Governor's Executive Counsel. (Complaint, Appendix Document 3, ¶ 14.)

As Mr. Cassanova repeatedly points out in his Complaint, his job duties and activities while taken as an employee of the Board were determined not by his supervisors but rather by the Executive Counsel for Governor Edwards. (See e.g., Complaint, Appendix Document 3, ¶¶ 14, 17, and 20.)

In an attempt to circumvent the restraints placed upon his activities by statute and to override the Judges' wishes that the accounting functions remain within the control of the Criminal District Court (who has an acute interest in the adequate functioning of the jury venire), Mr. Cassanova drafted proposed legislation which, if enacted, would transfer control back to himself as Secretary of the Board. (Complaint, Appendix Document 3, ¶ 18[2]). Mr. Cassanova was made aware that his actions in drafting the legislation were directly contrary to the wishes of his supervisors yet Mr. Cassanova, acting in connection with the Governor's office, prepared the legislation anyway. (Complaint, Appendix Document 3, ¶¶ 18[2] and 19). It is clear that a majority of the Judges opposed this legislation.

(4) **Mr. Cassanova's Termination**

On June 24, 1993, an en banc meeting of the Criminal District Court was held and, pursuant to their supervisory authority over all employees on the Board, voted to terminate Mr. Cassanova from his position as an employee of the Board. (Complaint, Appendix Document 3, ¶ 27). As Mr. Cassanova readily concedes in his Complaint, the action of the Judges in terminating him from his employment was done in an "administrative capacity". (Complaint, Appendix Document 3, ¶ 29). The Judges who voted in favor of his termination are defendants herein.

Proceedings Below

This action was brought on February 1, 1994, by

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[2]It should be noted that the Complaint contains two Paragraph 18's. The first Paragraph 18 is referenced here.

respondents, Noel Patrick Cassanova and Karen Sullivan Cassanova (jointly "the Cassanova's" or "the plaintiffs" or the "respondent") pursuant to 42 U.S.C. §1983 and other federal and state law seeking damages allegedly arising from violation of Mr. Cassanova's constitutional rights by petitioners. Defendants/petitioners, Frank A. Marullo, Jr., James F. McKay, III, Dennis J. Waldron, Morris Reed, Gerard J. Hansen, Patrick Quinlan, Calvin Johnson and Frank Shea (collectively "the Judges" or "the petitioner" or "the defendants") are all judges of the Criminal District Court for the Parish of Orleans, State of Louisiana.

Initially, prior to answering the Complaint, the Judges, collectively, filed a motion to strike certain claims together with a Joint Motion to Dismiss all claims based on the doctrine of qualified immunity or, in the alternative, for failure to state claims as to certain specific allegations contained in the Cassanova's various "counts" of the Complaint. The District Court denied defendants' motion to strike in its entirety, and ruled individually on defendants' specific allegations denying some and granting others dismissing a portion of plaintiffs' claims thereby reducing to plaintiffs' federal claims to Section 1983 claims. None of these orders has been appealed.

In a separate "Order and Reasons", dated June 3, 1994, the District Court ruled on the Judges' 12(b)(6) assertion of qualified immunity, denying the motion to dismiss based thereon on two separate grounds. (Appendix Document 2). Judge Clement rejected the Judges' contention that an objective legal ground for terminating an at-will employee factors into the qualified immunity analysis, holding that the only issue relative to the qualified immunity defense in this case was the existence of a clearly established constitutional right. In addition, Judge Clement specifically found that the affirmative defense of qualified immunity,

governed by Rule 8(c) of the Federal Rules of Civil Procedure, did not "clearly appear" on the face of the plaintiffs' Complaint as it must in this pre-answer case.

The judges appealed the District Court's denial of their Motion To Dismiss on grounds of qualified immunity, and the United States Court of Appeals for the Fifth Circuit dismissed the appeal "because the defense of qualified immunity was not erroneously denied." (Appendix Document 1.)

Basis For Federal Jurisdiction In The Court Of First Instance

The District Court had proper original jurisdiction pursuant to 28 U.S.C. §§1331 and 1343 in this damage action for wrongful termination and deprivation of constitutional rights asserted pursuant to 42 U.S.C. §1983.

Appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and jurisdiction was conferred as the appeal was from an order rendered in the District Court denying appellants' defense of qualified immunity.

ARGUMENT

I. The Petitioners Are Entitled To Qualified Immunity.

A. A Public Officer's Subjective State Of Mind, I.E., Motive, Is Irrelevant To Whether The Public Office Is Entitled To Qualified Immunity.

This Court has defined the parameters of qualified immunity as follows:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 817–818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In so ruling, this High Court adopted a test for qualified immunity based upon a determination of the objective reasonableness of an official's conduct, not upon his subjective state of mind. Id. at 817–818, 102 S.Ct. at 2738. This Court chose the objective standard, of course, in order to shield public officers from undue interference with their duties and from potentially disabling threats of liability and to avoid the excessive disruption of government by permitting the resolution of insubstantial claims before the defendant was subjected to discovery. Id. at 806 and 818, 102 S.Ct. at 2732 and 2738. As this Court stated:

> In the context of *Butz* [v. Economou, 438 U.S.

> 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)] attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be particularly disruptive of effective government.

457 U.S. at 816-817, 102 S.Ct. at 2737. Thus, this Court recognized the importance of qualified immunity to the operation of government and the necessity of basing such qualified immunity on objective facts which may be readily determinable early in a litigation and not on the subjective

state of mind of the government official, which in most cases cannot ever be determined for certain.

This Court has further defined the nature of qualified immunity, as necessitated by the considerations described in the quote immediately above, as being an immunity from suit rather than a mere defense to liability. Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 536 (1991), citing, Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). As such, questions of immunity should be decided by the court long before trial, not by a jury. Hunter, Id. at 228, 112 S.Ct. at 537. Thus, the question of qualified immunity should be decided by the Court, as a matter of law, if the undisputed facts in the case warrant it.

Since rendering the Harlow opinion, this Court has further explained the "objective legal reasonableness" rule to require a plaintiff resisting a plea of qualified immunity to show that the official's conduct was clearly unlawful in the light of pre-existing law. Anderson v. Creighton, 483 U.S. 632, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). Thus, in Anderson, the plaintiffs were required to demonstrate that the circumstances with which an FBI agent was confronted did not constitute probable cause for a warrantless search rather than to simply establish that the law is clear that warrantless searches not supported by probable cause violate the Fourth Amendment. Id. at 640-641, 107 S.Ct. at 3039. The Anderson Court summarized its holding thusly:

> The principles of qualified immunity that we reaffirm today require that Anderson [the FBI agent] be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a

> matter of law, reasonably have believed that the search of the Creightons' home was lawful.

Id. at 641, 107 S.Ct. at 3040. Thus, under the holding of the Anderson case, an official is entitled to qualified immunity if he could have reasonably believed that his conduct complained of was warranted by the law as applied to the facts of the case. Again, this is an objective test -- the official's actual motive is irrelevant to whether an official is entitled to qualified immunity.

B. When A Separate Valid Reason For Termination Exists, Then A First Amendment Right To Free Speech Prohibiting Discharge Is Not Clearly Established In The Governmental Employment Setting.

In the instant case, the respondents have alleged that the petitioners' termination of Mr. Cassanova's employment was not lawful and instead violated Mr. Cassanova's state and federal constitutional rights of freedom of speech, the right to peacefully assemble and to petition the government for redress of grievances, due process of law, privileges and immunities, and equal protection of the law. Counts 1-5, giving rise to their Section 1983 cause of action. The respondents summarized their claims in the District Court as follows:

> Mr. Cassanova was terminated essentially because (1) he engaged in his first amendment right to free speech in reporting financial misconduct to appropriate governmental authorities, and (2) he engaged in constitutionally protected activity in discussing with legislators and individuals in the

> Governor's office the need to statutorily revise the method by which the budgeted funds of the Jury Commission were handled. Both of these claims are asserted through 42 U.S.C. 1983. Plaintiff also asserts various state law claims under the pendant jurisdiction of this Court.

District Court Order and Reasons (Appendix Document 2), quoting, Plaintiffs Memorandum In Opposition To Defendants' Motion To Dismiss. And the Courts Below based their denial of the defendants' qualified immunity on the grounds that the defendants "[...] by terminating Mr. Cassanova's employment, may have violated his constitutional right to free speech [...]" and "[...] the right of an employee to blow the whistle on misconduct of public officials is a clearly established constitutional right and that defendants who violate that right are not, therefore, entitled to qualified immunity." Opinion of the Court of Appeal, Appendix Document 1 at A-2 and Order and Reasons of the District Court, Appendix Document 2 at A-8, respectively. Thus, the "clearly established right" so clear to the courts below was the right of freedom of speech.

The leading case on the constitutional right to freedom of speech and what constitutes a violation thereof in the employment setting is Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In Mt. Healthy, a public school teacher had engaged in constitutionally protected speech that the teacher claimed was the reason for the School Board's decision to terminate his employment. Id. at 284, 97 S.Ct. at 574. Additionally, the teacher had engaged in unprotected speech and behavior which may or may not have been the true reason for the School Board's decision. Id. at 281-287, 97 S.Ct. at 573-576. This Court ruled that in order to

determine whether a violation of an individual's right to free speech had occurred in the employment setting, the following analysis must be made:

> Initially, in this case, the burden was properly placed upon respondent [the teacher/employee] to show that his conduct was constitutionally protected, and that his conduct was a "substantial factor" -- or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the district court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

429 U.S. at 187, 97 S.Ct. at 576. Therefore, Mt. Healthy is clear that if an employment would have been terminated anyway, then there is no violation of First Amendment guarantees of free speech, even if there was protected speech which was a motivating factor in the termination of the employment. It follows then that while the right to free speech is clearly established, that right does not translate to a guarantee of continued employment when the employee engages in unprotected speech or activities, which in themselves would have caused the employer to terminate the employee's employment.

To restate: The First Amendment right to freedom of speech is clearly established in the employment setting only insofar as it prohibits a termination of employment, solely because the employee has engaged in protected speech, *in the absence of a separate valid reason for termination.*

When a separate valid reason for termination exists, then a First Amendment right to free speech prohibiting discharge is not clearly established[3]. Indeed, under Mt. Healthy, it is clearly established that the First Amendment does not prohibit discharge under such a circumstance.

This Court has recently elucidated the scope of the First Amendment in the at-will[4] governmental employment setting. An at-will government employee generally has no claim based on the Constitution at all. Waters v. Churchill, __ U.S. __, 114 S.Ct. 1878, 1890 (1994). This is not to say that speech on matters of public concern is not protected -- it is. Id. at __, 114 S.Ct. at 1884. But, "the government as employer indeed has far broader powers than does the government as sovereign." Id. at __, 114 S.Ct. at 1886. As the Waters Court stated:

> But though a private person is perfectly free to

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[3]The belief that such a First Amendment right was clearly established was at the base of the Court of Appeals' ruling.

[4]Mr. Cassanova was an at-will employee in this case. Louisiana law is clear that when there is no contract of employment for a definite term, both the employer and employee are free to end the employment relationship at any time. La.C.C. art. 2747; Varnado v. Rodeway Express, 557 So.2d 413, 415 (La. App. 4 Cir. 1990). Mr. Cassanova has not alleged that his employment had a particular term. La.R.S. 15:111, which provides the position of Secretary of the Board of Jury Commissioners does not specify a term of employment.

> uninhibitedly and robustly criticize the state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high ranking deputy for doing the same thing. [Citations omitted.] Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees.

Id. at __, 114 S.Ct. at 1886. Continuing in the same vein, this Court stated:

> [T]he reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Id. at __, 114 S.Ct. at 1888. Thus, this Court concluded:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id. at __, 114 S.Ct. at 1888. All of these quotes are clear that in the governmental employment context, a governmental employer has broad latitude to limit what his employee says, if the employee's unlimited speech would tend to disrupt the operation of the governmental entity of which he is an employee.

This Court also indicated in Waters that the scope of the First Amendment in the governmental employment setting, or, stated another way, the breadth of the latitude of a governmental employer to limit what his employee says, must be determined on a case by case basis. As this Court stated:

> We have never set forth a general test to determine when a procedural safeguard is required by the First Amendment -- just as we have never set forth a general test to determine what constitutes a compelling state interest, [citations omitted], or what categories of speech are so lacking in value that they fall outside the protection of the First Amendment, [citations omitted], or many other matters -- and we do not purport to do so now. But though we agree with Justice SCALIA that the lack of such a test is inconvenient [...] this does not relieve us of our responsibility to decide the case that is before us today. [...]We must therefore reconcile ourselves to answering the questions on a case by case basis, at least until some workable general rule emerges. (Underlining added.)

Id. at __, 114 S.Ct. at 1885-1886. Petitioners submit that since there is no workable general rule and no general principle to determine where the line is drawn, the Waters

case is further authority that the First Amendment right to freedom of speech prohibiting discharge in the governmental employment setting is not clearly established. For the same reason, Waters is not dispositive of the issue of qualified immunity.

The Mt. Healthy and Waters Courts both indicated that the question of a defendant's motive is relevant to the merits of a First Amendment claim based on retaliatory discharge. The Waters Court stated:

> Though Davis and Waters would have been justified in firing Churchill for the statements outlined above, there remains the question of whether Churchill was actually fired because of those statements, or because of something else. *See Mt. Healthy, supra,* at 286–287, 97 S.Ct., at 575–576.
>
> Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation.

__ U.S. __ at ___, 114 S.Ct. at 1891. And the Mt. Healthy Court ruled that once the employee showed that his conduct was constitutionally protected and that his conduct was a motivating factor in the employer's decision not to rehire him, then the burden shifted to the employer to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." 429 U.S. at 187, 97 S.Ct. at 576 (see the quote from the Mt. Healthy Opinion supra at 14). Thus, a defendant's actual motivation may be relevant at trial to the issue of whether a constitutional violation occurred.

The Mt. Healthy and Waters decisions are not

inconsistent, however, with the Harlow and Anderson decisions, which eliminated subjective state of mind as a factor to be considered in determining entitlement to qualified immunity. This elimination of actual motivation as relevant to qualified immunity was part of the "balancing of competing values" inherent in qualified immunity. (See the discussion of qualified immunity at 9–12, supra.)

Petitioners respectfully submit that the actual motivation of the defendants in this case is irrelevant to the issue of whether they are entitled to qualified immunity. If the undisputed facts developed very early on, either in the Complaint or through discovery, could clearly support a reasonable belief that the termination of an employee was warranted because of unprotected activities by the employee, then the employer is entitled to qualified immunity as a matter of law[5]. Petitioners submit that as a matter of law, given the facts of this case as pleaded, their termination of Mr. Cassanova's employment was lawful and objectively

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[5]It should be remembered that, under Mt. Healthy, even if protected speech is a "motivating factor" in a dismissal, that fact is not dispositive. Furthermore, the "balancing of competing values" inherent in qualified immunity requires that the issue of qualified immunity be determined at the earliest time possible in this case. The City of New Orleans is currently in a crisis of crime. The people of New Orleans can ill-afford to have their criminal court judges distracted from their governmental duties and inhibited in the exercise of their discretion during a protracted litigation against them. See, quote from Harlow v. Fitzgerald at 10, supra.

warranted and did not violate a clearly established constitutional right of freedom of speech. Thus, Mr. Cassanova's allegations as to the actual motives of the petitioners in discharging him are simply irrelevant to whether the petitioners are entitled to qualified immunity.

C. Respondent Engaged In Conduct Fully Warranting The Termination Of His Employment.

Mr. Cassanova's Complaint is replete with admissions of behavior, both verbal and nonverbal, fully warranting termination of his employment. Mr. Cassanova's Complaint is clear that he assumed the position of Executive Director of the Board of Jury Commissioners with an agenda established neither by the Board nor by the Criminal District Court. As Paragraphs 7, 10, 13, 14, 16, 20, and 21 (Complaint, Appendix Document 3) indicate, Mr. Cassanova's understanding of the duties of his position, the person to whom he was to report confidential information acquired while working for the Board, and the person to whom Mr. Cassanova was ultimately responsible was the Executive Counsel of the Governor. Thus, in a very real sense, his activities at the Board were not on behalf of the Board. Further, Mr. Cassanova's Complaint is clear that he considered his position of "Executive Director" to in fact be "Secretary of the Board of Jury Commissioners" within the meaning of La. R.S. 15:111. (Complaint, Appendix Document 3, ¶ 4.) Such a position clearly carries with it a duty of confidentiality to the Board and to the Criminal District Court regarding decision making which is totally incompatible with Mr. Cassanova's loyalty to and reliance and dependence on the Executive Counsel of the Governor.

Mr. Cassanova's reliance upon the Executive

Counsel of the Governor for his own job description was totally improper. The Executive Counsel of the Governor was not the proper party to provide Mr. Cassanova's job description because under clear Louisiana law, the operation of the Board and its employees is determined by the Board and the Criminal District Court, with the latter having the ultimate authority. La. C.Cr.P. art. 404.1 provides in part:

> D. The Board in such parishes [of 475,000 or more in population] shall develop a plan to govern its operations. Such plan shall be approved by a majority of the judges of the Criminal District Court of such parishes.
>
> E. The Board shall have the authority over all its employees, subject to the supervision of the Criminal District Court. The Board by majority vote, shall determine all matters relating to is jurisdiction subject only to the approval of the Judges of the District Court or Criminal District Court.
>
> F. The accounting functions of the Board and of the Jury Commission shall be transferred to the Judicial Administrator of the Criminal District Court.
>
> G. All procedures and policies developed by the Jury Commission shall be under the direction and subject to the approval of the Criminal District Court, en banc.

These provisions all uniformly provide that the Board and the

Criminal District Court are responsible for decisions relating to the operation of the Board, with the Criminal District Court having the final vote on these operations. Thus, as a matter of law, the Executive Counsel of the Governor had no power whatsoever to decide what Mr. Cassanova's job duties were. And, Mr. Cassanova's dependence upon the Executive Counsel for instructions as to how to perform his job fully warranted his dismissal.

Mr. Cassanova's Complaint is also clear that he demanded access to the financial records of the Board including its payroll account, operating account, budget and inventory control sheets. Complaint, Appendix Document 3, ¶¶7, 8, and 10. Mr. Cassanova's alleged reason for attempting to obtain access to these records was that "his duties [as explained to him by the Executive Counsel of the Governor] required him to thoroughly analyze the financial records of the Board, particularly in regard to payroll and budget for the lurpose [sic] of determining whether public monies were being properly and prudently spent, whether those receiving checks from the Board were actually employed by the Board, and whether the level of funding was appropriate to meet the needs and responsibilities of the Board." (Complaint, Appendix Document 3, ¶ 7.) In fact, Louisiana law is clear that the Secretary of the Board is not the appropriate entity to conduct the activities Mr. Cassanova sought to conduct.

La.C.Cr.P. 404.1(F), quoted supra, is clear that the duty of monitoring the financial transactions of the Board rests in the Judicial Administrator of the Criminal District Court, not in the Secretary of the Board.[6] Therefore, Article

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[6]Mr. Cassanova's participation in the attempt to enact legislation which would have transferred accounting functions from

404.1 is clear that analyzing the records of the Board, including the Board's inventory control sheets, operating accounting, payroll account, and budget were not within Mr. Cassanova's domain as the Secretary of the Board.[7] By repeatedly attempting to exercise the accounting function for the Board, Mr. Cassanova overstepped his authority to an extent fully warranting his dismissal

In short, Mr. Cassanova's behavior during his employment at the Commission was ultra vires, disruptive, and destined him for firing. He was a bull in a china shop who had to be driven to the great outdoors.

Furthermore, Mr. Cassanova was in fact not a "whistle blower". His allegations do not support the proposition that his activities in some way constituted an exercise of his right to free speech in reporting questionable practices of public concern to appropriate state authorities. It is clear that Mr. Cassanova's communications with the Governor and his Executive Counsel were the result of their dominance of him in his performance of his job and not the result of Mr. Cassanova's desire to report irregularities to an "appropriate authority". Further, the Complaint contains no allegation that Mr. Cassanova had made any "reports"

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the Judicial Administrator to the Board is proof that Mr. Cassanova himself believed that the current law precluded him from following the Governor's Executive Counsel's instructions. (Complaint, Appendix Document 3, ¶ 18.)

[7]Mr. Cassanova's assertions that these activities were within his employment responsibilities (Complaint, Appendix Document 3, ¶¶ 7, 8, 10) are conclusions of law unsupported by the law.

whatsoever to either the employees of the Louisiana Civil Service Commission or to the Legislative Auditor prior to his being fired on June 24, 1993. Thus, Mr. Cassanova's claim at ¶38 that he was terminated because he had exercised his free speech in reporting to appropriate authorities is not supported by the allegations of his Petition. Indeed, "appropriate authorities" to whom Mr. Cassanova could have reported the alleged improprieties of the Board and/or Criminal District Court were the Judiciary Commission as provided in Article V, §25 of the Louisiana Constitution of 1974 and any law enforcement agencies having jurisdiction to investigate allegedly unlawful activities. It is clear then that Mr. Cassanova, by his own allegations, simply did not attempt to report alleged improprieties to an "appropriate authority" before his dismissal from employment. Therefore his statements to the Governor's Executive Counsel were entitled to little if any protection under the First Amendment. Surely a fair balance in the employment setting is to protect speech to appropriate investigative authorities and not to protect disruptive speech to others made for ulterior purposes. See, Waters, 114 S.Ct. at 1890–1891.

D. Petitioners Were The Appropriate Entity To Discharge Respondent.

The defendants were entirely reasonable in believing that they possessed the authority under Louisiana law to terminate Mr. Cassanova's employment. La. C.Cr.Proc. art. 404.1(E), quoted supra, provides that the authority of the Board over all of its employees is subject to the supervision of the Criminal District Court. Although not specifically defined in the statute, the concept of "supervision" is nothing new. Supervision is "the act, process, or occupation of supervising..." Webster's Third New International Dictionary, 2296 (1976). To "supervise" is to

"oversee with the powers of direction and decision in the implementation of one's own or another's intention..." Ibid. And finally, to complete the analysis, a "supervisor" is one that supervises a person, group, department, organization, or operation, as "(a): such a person having authority designated by an employer to hire, transfer, spend, recall, promote, assign, or discharge another employee or to recommend such action..." (Underlining added.) Id. at 2296. Thus, a reasonable interpretation of this language is that the Criminal District Court, in the exercise of its supervisory power over the Board's authority over its employees, may terminate the employment of an employee.

The legislative history of Senate Bill 704, which was enacted as 1985 Louisiana Act No. 558 and codified as Article 404.1, confirms this interpretation. The original bill approved by the Louisiana Senate contained in part the following provision:

> E. The Board shall have absolute authority over all of its employees, including any administrator or directors. The Board, by a majority vote, shall determine all matters related to its jurisdiction, subject only to the approval of the judges of the district court or the criminal district court.

The enrolled bill, and thus Article 404.1 states:

> E. The Board shall have authority over all of its employees, subject to supervision by the criminal district court. The Board, by a majority vote, shall determine all matters related to its jurisdiction, subject only to the approval of the judges of the district

court or criminal district court.

Thus, the House amended the bill, and the Senate approved that amendment, to delete the language that the Board would have "absolute authority", and to instead make the authority of the Board over its employees "subject to the supervision by the criminal district court." Hence, the defendants had every reason to believe that their termination of Mr. Cassanova's employment was in accordance with Louisiana law.[8]

Based on the foregoing, the defendants respectfully submit that as a matter of law and given the facts of this case as pleaded, their termination of Mr. Cassanova's employment was objectively warranted and lawful. Therefore, the defendants are entitled to qualified immunity as defined by this Honorable Court in Anderson v. Creighton.

II. The Defense Of qualified Immunity Asserted By The Judges Appears On The Face If Mr. Cassanova's Complaint By Virtue Of His Specific Allegations Establishing Official Administrative

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[8]The defendants respectfully disagree with La. Op. Atty. Gen. No. 93-404 to the effect that only the Board has the authority to fire its employees. In any event, Mr. Cassanova's employment was terminated on June 24, 1993, before Opinion No. 93-404 was rendered on July 8, 1993. Therefore, it played no role in the defendants' opinions of their power to fire Mr. Cassanova. ¶ 27, 30.

Capacity and Discretionary Authority.[9]

To be considered in a 12(b)(6) motion, the affirmative defense of qualified immunity, like any affirmative defense, need not be specifically pled in a responsive pleading. If an affirmative defense appears on the face of the pleading sought to be dismissed, a 12(b)(6) motion may be properly granted. Kansa Reinsurance Company v. Congressional Mortgage Corporation, 20 F.3d 1362, 1366 (5th Cir. 1994). Petitioners do not dispute the nature of the qualified immunity defense as an affirmative one, Harlow v. Fitzgerald, 457 U.S. 813, 815, 102 S.Ct. 2727, 2736 (1982), nor is it disputed that the availability of the defense must be specifically established by the pleadings. What petitioners contest is the District Court's[10] ruling on the "face of the pleading" exception.

To "state" the affirmative defense of qualified immunity, all that must be established is that the conduct in question occurred while the actor was acting (1) in his official capacity, and (2) within the scope of the discretionary authority. Cronen v. Texas Department of Human Services, 977 F.2d 934, 939 (5th Cir. 1992). Both of these requisites are established by Mr. Cassanova in his Complaint: there is no need for the Judges to plead these elements. Judge Clement's "finding" that the affirmative defense of qualified

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[9]The sufficiency of the pleading in this regard is a legal conclusion which this court reviews de novo.

[10]The Court of Appeal did not address this ruling of the District Court. Petitioners present the following argument in the event this Court addresses that ruling.

immunity "does not clearly appear on the face of the plaintiff's Complaint" is thus inconsistent with a plain reading of the Complaint as the following will illustrate.

A. Sitting State Judges Acting in an Administrative Capacity are Entitled to Assert Qualified Immunity and because the Cassanova's Specifically Alleged Capacity of the Judges, the First Requisite for Qualified Immunity is Met.

Qualified immunity protects government officials who engage in discretionary activity. Cronen, 977 F.2d at 939. There is no doubt that the Judges were acting in an official capacity as State judges at the time the termination of Mr. Cassanova occurred. In this regard the Complaint itself states as follows:

39.

> Cassanova was wrongfully "terminated" and payments to him "suspended" without lawful cause by State judges acting in administrative and not judicial capacities, who, under the color of State law, in the form of State action, intentionally disregarded State and federal law by conduct involving a reckless disregard or callous indifference to Cassanova's rights, and, in doing so, wrongfully damaged plaintiff.

Appendix Document 3. (Underlining added). As the above quoted language of the Complaint makes clear, the Judges were in fact sitting judges acting in their official capacities at the time of the termination occurred.

In addition to the allegations set forth at paragraph 39 of the Complaint, further allegations set forth at paragraph

29 of the Complaint establish the capacity of the Judges at the time the allegedly violative action occurred. (Appendix Document 3.) At paragraph 29 the Cassanova's specifically allege that the actions taken by the Judges "was done by defendants in their administrative capacity..." (Appendix Document 3). After Forrester v. White, 484 U.S. 219, 108 S.Ct. 538 (1988), it is clear that when a judge makes an employment related decision, such as was done with respect to Mr. Cassanova, he is acting in an administrative capacity similar to that of other public officials entitled to qualified immunity for their employment decisions. Forrester, 484 U.S. at 229, 108 S.Ct. at 545. It is thus clear that the actions taken by the Judges were "official" actions within the meaning of the doctrine and that the administrative capacity of the Judges and their entitlement to the defense insofar as this requisite is concerned clearly appears on the face of the plaintiff's Complaint.

B. The Judges Were Acting Within Their Discretionary Supervisory Authority In Terminating Mr. Cassanova As An At-Will Employee Of The Board.

The Judges as members of the Criminal District Court for the Parish of Orleans have supervisory authority over the employees of the Board. La.C.Cr.P. art. 404.1(E). Subsumed within the Court's supervisory power is the power to terminate at-will employees of the Board such as Mr. Cassanova. (See argument at 24-26 and n.4 supra[11].)

---

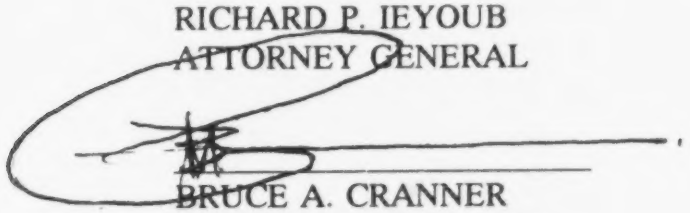
[11]28 U.S.C. § 1988 provides that where federal law is silent, a court looks to state law to supply the rule of decision. See also Wilson v. Garcia, 471 U.S. 261, 267 n.13, 105 S.Ct. 1942.

Since Mr. Cassanova specifically pleads his position with the Board (Appendix Document 3, ¶¶ 4 and 6), pleads that a majority of the Judges after an en banc meeting and vote decided to terminate him (Appendix Document 3, ¶ 27), and that the Judges did so in their capacity as "judges" (Appendix Document 3, ¶ 39), and given that the law is clear that the Judges have supervisory authority over all the Board's employees, the second requisite, discretionary authority is likewise established by the pleadings.

Because the Cassanova's specifically allege the capacity of the Judges at the time of the termination and because the law is clear that the Judges of the Criminal Court have authority to terminate at-will employees of the Board in their discretion, Mr. Cassanova's pleading of his status as an employee of the Board makes complete the facts sufficient to give rise to a consideration of the qualified immunity defense.

Respectfully submitted,

RICHARD P. IEYOUB
ATTORNEY GENERAL



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Supreme Court, U.S.
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NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK A. MARULLO, JR., ET AL.
PETITIONERS

VERSUS

NOEL PATRICK CASSANOVA, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30368
Summary Calendar

NOEL PATRICK CASSANOVA
and KAREN SULLIVAN CASSANOVA,

Plaintiffs-Appellees,

versus

FRANK A. MARULLO, JR., ET AL.,

Defendants-Appellants.

Appeal from the United States District
Court for the Eastern District of
Louisiana (CA-94-0376)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellants, judges of the criminal district court for the Parish of Orleans, challenge the district court's refusal to dismiss appellees' § 1983 complaint on the grounds of qualified immunity. An interlocutory appeal is permitted from the court's order only to the extent that qualified immunity was denied as a matter of law. Mitchell v. Forsythe, 472 U.S. 511, 105 S.Ct. 2806 (1985).

Having reviewed the district court's order in light of appellees' complaint, we agree with her first conclusion: taking all of appellees' allegations as true, the appellants, by terminating Mr. Cassanova's employment, may have violated his constitutional right to free speech. This conclusion is

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled priniciples of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

based on Cassanova's allegations that he was terminated because he was acting as a "whistle blower" and was giving advice to the Governor and other public officials about the operations of the Jury Commission. Appellants may or may not have a chance of succeeding in their defense of qualified immunity at trial or at a much earlier point in the proceedings. As the district court recognized, however, it is plainly premature to dismiss this case on the pleadings.

Because the defense of qualified immunity was not erroneously denied, this appeal is DISMISSED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NOEL PATRICK CASSANOVA and KAREN SULLIVAN CASSANOVA — CIVIL ACTION

VERSUS — NO. 94-376

FRANK A. MARULLO, JR., JAMES F. McKAY, III, DENNIS J. WALDRON, MORRIS REED, GERARD J. HANSEN, PATRICK QUINLAN, CALVIN JOHNSON, and FRANK SHEA — SECTION "N"

ORDER AND REASONS

Defendants have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds that they are entitled to qualified immunity and have filed a motion to stay discovery pending resolution of this issue.[1] For reasons stated below, defendants' motion to dismiss on grounds of

[1] The defendants have alleged alternative grounds for their motion to dismiss which will be addressed by subsequent order of this Court.

qualified immunity is DENIED, and defendants' motion to stay discovery pending ruling on the motion to dismiss on grounds of qualified immunity is DENIED as moot.

Plaintiffs summarize their claims as follows:

> Mr. Cassanova was terminated essentially because (1) he engaged in his first amendment right to free speech in reporting financial misconduct to appropriate governmental authorities, and (2) he engaged in constitutionally protected activity in discussing with legislators and individuals in the Governor's office the need to statutorily revise the method by which the budgeted funds of the Jury Commission were handled. Both of these claims are asserted through 42 U.S.C. 1983. Plaintiff also asserts various state law claims under the pendant jurisdiction of this court.

(Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, p.2). Plaintiff relies upon Frazier v. King, 873 F.2d 820 (5th Cir. 1989) wherein the Fifth Circuit set forth plaintiff's burden as follows:

> In order to establish a constitutional violation Frazier must first prove that her speech

> involved a matter of public concern. [citation omitted] Second, she must demonstrate that her interest in 'commenting upon matters of public concern' is greater than the defendants' interest in 'promoting the efficiency of the public services [they] perform.' [citation omitted] Third, she must show that her speech motivated the defendants' decision to fire her. If Frazier is able to prove these three elements, the burden shifts to the defendants to prove that they would have fired Frazier even if she had not exercised her right to free speech.

The Court in Frazier found that the defendants had violated the plaintiff's First Amendment rights and also held that the defendants were not entitled to qualified immunity.

> There has been extensive publicity over the past decade concerning the rights and protections afforded whistle blowers. A reasonable official would know that it would be a violation of Frazier's rights to fire her after she blew the whistle on the improprieties at the prison. See Brawner, 855 F.2d at 193 (stating that a "reasonably objective public official would have known that termination of an employee for his speech concerning misconduct by public officials would violate a clearly established constitutional right").

> Defendants contend that Frazier is distinguishable

"[b]ecause the plaintiffs have alleged facts which fully support the dismissal of Mr. Cassanova from his employment, independent of any 'speech' related action, qualified immunity attaches." (Defendants' Reply Memorandum, p. 6). However, defendants are confusing their burden of proof (as it may be shifted to them) concerning whether plaintiffs' constitutional rights were actually violated with their defense of qualified immunity. Defendants' contention that they had a lawful reason for firing Mr. Cassanova may be relevant regarding whether Mr. Cassanova's rights were in fact violated but not regarding whether the rights allegedly violated were clearly established.

Plaintiffs allege that Mr. Cassanova was fired because, inter alia, he exercised his First Amendment rights and that the reasons given by defendants for seeking to have Mr. Cassanova terminated were pretextual. For purposes of defendants' motion to dismiss, these allegations must be taken

as true.[2] Therefore the dispositive issue is whether the right allegedly violated was a clearly established right. If so, the defendants are not entitled to qualified immunity. The Fifth Circuit has recognized that the right of an employee to blow the whistle on misconduct of public officials is a clearly established constitutional right and that defendants who violated that right are not, therefore, entitled to qualified immunity. See, Frazier, supra, and cases cited therein.

Further, qualified immunity is an affirmative defense which must be pleaded by defendants. Harlow v. Fitzgerald, 457 U.S. 813, 815, 102 S.Ct. 2727, 2736 (1982). Thus, plaintiffs' complaint may only be dismissed on grounds of qualified immunity if "the defense clearly . . . appears on the face of the pleading." Wright & Miller, § 1357, pp. 348–49.

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[2] In ruling on a motion to dismiss, the Court must accept as true all well pleaded facts and all inferences from those facts and must construe the complaint liberally in favor of the plaintiff. American Waste & Pollution Control Co. v. Browning–Ferris, Inc., 949 F.2d 1384 (5th Cir. 1991).

This Court finds that the defense of qualified immunity does not clearly appear on the face of plaintiffs' complaint.

Accordingly,

IT IS ORDERED that defendants' motion to dismiss on grounds of qualified immunity is DENIED.

IT IS FURTHER ORDERED that defendants' motion to stay discovery pending determination of defendants' motion to dismiss on grounds of qualified immunity is DENIED as moot.[3]

New Orleans, Louisiana, this 2 day of June, 1994.

sig/Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

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[3] Defendants have not requested that discovery be limited to the issue of qualified immunity, contending that there are no facts in dispute underlying the issue of qualified immunity which require discovery. Therefore, this Court does not so limit discovery.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NOEL PATRICK CASSANOVA and KAREN SULLIVAN CASSANOVA	CIVIL ACTION
VS.	NO. 94-0376
FRANK A. MARULLO, JR., JAMES F. McKAY, III, DENNIS J. WALDRON, MORRIS REED, GERARD J. HANSON, PATRICK QUINLAN, CALVIN JOHNSON, and FRANK SHEA	SECTION "N" MAGISTRATE (1) JURY DEMAND

AMENDED COMPLAINT

The complaint of Noel Patrick Cassanova ("Cassanova"), and Karen Sullivan Cassanova, husband and wife, both residents of the full age of majority and domiciled in the Parish of Orleans, State of Louisiana, respectfully represents:

1.

This district court has original jurisdiction over the

claims and causes of actions asserted in this civil action pursuant to 28 USC Sec. 1331 and 1343.

2.

Venue is proper in this district court pursuant to 28 USC Sec. 1391(b) in that all defendants reside in this judicial district and, further, the claim arose in this judicial district.

3.

The following persons are made defendants herein and are sued personally:

A. **FRANK A. MARULLO**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

B. **MORRIS W. REED**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

C. **PATRICK H. QUINLAN**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

D. **CALVIN JOHNSON**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

E. **FRANK J. SHEA**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

F. **JAMES F. McKAY**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

G. **GERARD J. HANSEN**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana;

H. **DENNIS WALDRON**, a resident of the full age of majority of the Parish of Orleans, State of Louisiana.

4.

The Board of Jury Commissioners for the Parish of Orleans (hereinafter "Board") is a statutorily created governmental entity of the State of Louisiana which is charged with the responsibility of securing juries for criminal and civil courts in Orleans Parish. Under the provisions of Code of Criminal Procedure Art. 404 and 404.1 the Board is composed of five commissioners appointed by the governor who serve at his pleasure. Under the provisions of R.S.

15:111 the commissioners "shall elect a secretary of the board of jury commissioners". This secretary is commonly referred to as "Executive Director" and shall be referred to as such hereinafter. The Board and its employees shall be referred to hereinafter as "Jury Commission".

5.

In 1986, Louisiana Code of Criminal Procedure Article 404.1 was enacted. This article transferred the accounting functions of the Jury Commission to the Judicial Administrator of the Criminal District Court for the Parish of Orleans, which, according to the statute, had certain supervisory functions over the Commission. Prior to that time, all check writing and accounting functions were done by an employee of the Board under the supervision of the Board. Subsequent to the transfer, the financial and check writing functions were done pursuant to the direction and control of certain judges on the Criminal District Court.

6.

On February 3, 1993, a special meeting of the Board was held for the purpose of filling the vacant position of Executive Director of the Board. Plaintiff, Cassanova, by unanimous vote, was appointed to fill that position at a salary of $38,000.00 per year, plus applicable fringe benefits, which appointment was retroactive to February 1, 1993. As Executive Director, Cassanova was responsible for the proper functioning of the Board and Jury Commission, their business dealings and financial integrity.

7.

Cassanova had been recommended to serve as Executive Director by Governor Edwin Edwards. Prior to plaintiff assuming his position, he met with the Executive Counsel for the governor for the purpose of discussing his appointment. At this meeting plaintiff was informed that as Executive Director his duties required him to thoroughly

analyze the financial records of the Board, particularly in regard to payroll and budget, for the lurpose of determining whether public monies were being properly and prudently spent, whether those receiving checks from the Board were actually employed by the Board, and whether the level of funding was appropriate to meet the needs and responsibilities of the Board.

8.

Having assumed his position, and in compliance with the duties imposed upon him by his position, plaintiff sought to review the Jury Commission's payroll account, operating account, budget and inventory control sheets. Cassanova learned that these records had been taken by the Judicial Administrator and Judge Marullo. Cassanova requested the records from the Assistant Judicial Administrator and was informed by her that she maintained the payroll and operating account, that the Judicial Administrator maintained the budget

and that an employee of the Judicial Administrator had the inventory control sheets. Cassanova was initially informed that the records would be readily made available to him; however, when he sought to pick up the records two days later, he was informed by the Assistant Judicial Administrator that Judge Marullo had ordered her to prohibit plaintiff from viewing or taking possession of the records.

9.

Although Judge Marullo is not the chief judge of the Criminal District Court, he exercises power and control over the operations and policies (formal and informal) of the Court, the hiring and firing of personnel and the operation of the Criminal Court Building out of proportion to the power and authority exercised by other members of the Court.

10.

After being denied access to the records, plaintiff called the Governor's office and informed the Governor's

Executive Counsel of his inability to obtain the records. Plaintiff was informed that the Board, as a matter of law, had a right to the records. Plaintiff returned to the Assistant Judicial Administrator to reassert his right to review the records. Plaintiff was informed by the Assistant Judicial Administrator, the Judicial Administrator as well as the employee in possession of inventory control sheets that they were forbidden by Judge Marullo from providing plaintiff with the records and that he would have to appear before and en banc meeting of the Criminal Court to request the records from all of the judges.

11.

Plaintiff informed Judge Jerome M. Winsberg, Chief Judge of the Criminal Court, of his inability to obtain the requested financial records. Judge Winsberg provided plaintiff with a copy of the budget and stated that he would assist plaintiff in obtaining the other records.

12.

The day plaintiff obtained a copy of the budget he reviewed it with the Chairperson of the Board as well as the Jury Pool Coordinator who were both long term employees of the Board. Review of the budget showed employees carried on the Board's payroll who could not be identified as working for the Board. Plaintiff also was provided partial inventory control sheets which revealed a purchase in excess of $5,000.00 for Queen Anne furniture which was listed as being used in the Jury Commission Office. This furniture, however, was not being used by the Jury Commission nor had it been used by the Board.

13.

The en banc meeting was held on March 1, 1993. At this meeting plaintiff stated that he desired to review the payroll, operating account, budget and inventory control sheets of the Board. Judge McKay inquired as to the purpose

of the request. Plaintiff responded that it had come to his attention and the attention of the Board that considerable sums of money allocated to the Jury Commission had been used on furniture and payroll totally unrelated to Jury Commission activities. At this point Judge Marullo stated that there was no Jury Commission, that the Criminal Court had taken over the Commission and that any funds budgeted to the Board were for the exclusive use of the Criminal Court. Plaintiff informed the Court that he would communicate this statement to the Governor's Executive Counsel. Judge McKay stated that plaintiff would be provided with a copy of the budget and that if the budget ended up in the press the judges would now how it got there. No mention was made of the other records. The minutes of the meeting reflect that the Court voted to provide plaintiff a copy of the budget of the Jury Commission.

Plaintiff conveyed the results of the meeting to the Governor's Executive Counsel and was informed that the funds budgeted for use by the Board were for the exclusive use of the board and not for the use of the Criminal Curt or individual judges.

15.

Several days subsequent to the en banc meeting plaintiff received from the Assistant Judicial Administrator certain financial records of the Board, including payroll records and inventory control sheets. These records were reviewed by plaintiff, the Board's Chairperson and Jury Pool Coordinator. This review indicated approximately $25,000.00 travel expenses charged to the Board and paid for from the Board's funds. Investigation revealed that the actual funds expended but the Board over the entire time period was approximately $2,000.00. Further investigation revealed that the balance of approximately $23,000.00 had been used by

the Criminal Court Judicial Administrator purportedly to lobby the Louisiana Legislature in Baton Rouge on behalf of the Orleans Criminal Court. Other questionable payroll and property entries were also discovered. In addition, it was discovered that the audit for the Orleans Criminal Court was paid entirely from the Board's funds.

16.

Plaintiff informed the Governor's Executive Counsel of what was revealed by examination of the records. Plaintiff was informed that if the court was acting in this manner that these practices were very questionable. Plaintiff informed the Judicial Administrator and members of the Court that he had been informed that such practices were questionable.

17.

Judge Marullo and the Judicial Administrator stated that the previous practices would not be stopped and the funds would be used for whatever purpose he (Marullo) or

the Court pleased. The Governor's Executive Counsel was informed that no changes in the practices of the Judges were forthcoming.

18.

Proposed legislation was drafted, which among other things, would have transferred accounting functions from the Judicial Administrator back to the Board. A copy of the proposed legislation was provided to the Court by plaintiff. The Criminal Court en banc discussed the proposed legislation and at this meeting Judge Marullo stated, among other things, that he (Marullo) would have plaintiff's job and take him off the payroll. Defendants stated that they were opposed to the proposal.

18.

Plaintiff met with Judge Marullo in his chambers to discuss the proposed legislation and his attempts to review the financial records of the Board in his capacity of Executive

Director of the Board. In this meeting Judge Marullo informed plaintiff that if he did not prevent the filing of the proposed legislation, Marullo would have him terminated from his job after the legislative session. Judge Marullo's position, as expressed to plaintiff, was that it was Marullo's building, jobs and money and that any one who did not agree with that position would have to go.

19.

The day after meeting with Judge Marullo, the proposed legislation was filed.

20.

In compliance with a request from the Executive Counsel, plaintiff, on April 21, 1993, wrote Governor Edwards formally informing him of the results of his examination of the records of the Board.

21.

In response to this letter the Governor instructed

plaintiff to call a special meeting involving Judge Marullo, representing his position, Chief Judge Winsberg, on behalf of the Court, plaintiff, representing the Board, and the Governor's Executive Counsel. This meeting was held at the Criminal District Court in New Orleans and was attended by Judges Marullo, McKay, Shea, Winsberg and Cannizzaro, the Assistant Judicial Administrator, plaintiff and the Governor's Executive Counsel. Plaintiff was requested by Judge McKay to remain out of the meeting room at the beginning of the meeting. Plaintiff has been informed that shortly after the meeting began the Governor's counsel asked Judge Marullo whether it was true that the Board's funds had been used for lobbying purposes. In response, Judge Marullo stated that as far as he was concerned the meeting was over and walked out. As he walked past plaintiff Judge Marullo stated: "You've dug a big hole for yourself. You are out of here. You are finished."

22.

Plaintiff was called into the meeting by Judge Winsberg and was present for the balance of the meeting. During the meeting Judge McKay stated that the Criminal Court had no authority to use jury commission funds on an payroll or other expenses unrelated to jury commission activities. He further stated that he could not justify using the Board's funds on non-Board business. Nevertheless, he stated that he opposed the proposed legislation. Judges Cannizzaro and Winsberg stated that they favored the legislation.

23.

On May 1, 1993, plaintiff requested an opinion from the Attorney General's office whether the Criminal Court had the authority to fire him as Executive Director.

24.

On or about May 7, 1993, the Chairperson of the

Board was requested by the Judicial Administrator to sign a letter drafted on Jury Commission letterhead but not prepared by the Jury Commission attesting to the truthfulness of the financial statement filed with the Legislative Auditor, including all funds under the control of the Jury Commission. Because of the investigation into the use of the Jury Commission funds and the discovery of questionable expenditures the Chairperson refused to sign the letter. This fact was transmitted to defendants.

25.

As a result of requesting an Attorney General's opinion the Attorney General's office inquired as to the number of classified employees hired by the Board. Plaintiff responded "none". He was then informed that that had to be incorrect. Subsequent investigation revealed that the Board's employees, according to the Director of Civil Service, had been improperly removed from state classified service, at the

urging of Judge Marullo, in October, 1989. In July, it came to plaintiff's attention that several of the Board's personnel were listed as unclassified employees, which, according to the Attorney General's office, was improper. Plaintiff then contacted the State Civil Service Commission for the purpose of transferring the Board's unclassified employees to classified status. On August 17 plaintiff received a directive from Herbert Sumrall, Director, Louisiana Civil Service, instructing plaintiff that Commission employees should be in state classified service. Plaintiff then began to institute proceedings to have the Board's employees classified under Civil Service which activities were known to defendants.

26.

On June 15, 1993, plaintiff received his last check.

27.

Plaintiff subsequently learned that the Court voted to fire him from his position as Executive Director on June 24,

1993. The minutes of an en banc meeting held on that date show that Judge Marullo moved to fire plaintiff, which motion was seconded by Judge McKay. Those voting to terminate plaintiff were Judges Frank J. Shea, Frank A. Marullo, Jr., Gerard J. Hansen, James F. McKay, III, Patrick Quinlan, Calvin Johnson and Morris Reed. The minutes of the meeting do not give a reason for the termination.

28.

At no time has plaintiff received any formal notification from the Court that he had been terminated. Plaintiff has since learned that a "Separation Notice Alleging Disqualification" was prepared on June 24, 1993, and signed by Judge Marullo, stating that "Mr. Cassanova was dismissed because of absenteeism due to his attending legislative hearings in Baton Rouge when he should have been in New Orleans" as well as for "failure of performing his duties in the Jury Commission's Office because of his chronic

absenteeism". On July 13, 1993, a document was signed by Judges Reed, Quinlan, Marullo, Johnson, Waldron, Shea, McKay and Hansen ordering the Judicial Administrator's Office to remove plaintiff from the Jury Commission payroll. In addition, an "official letter of notification", dated June 24, 1993, and signed by Judges Reed, Quinlan, Marullo, Johnson, Shea, McKay and Hansen" stated that plaintiff was terminated for the reasons set forth above, and in addition stated that his termination was also "due to other budgetary restraints."

29.

The termination of plaintiff's employment by defendants and the ordering of the cessation of his paychecks was done without legal cause or authority and in retaliation for plaintiff engaging in constitutionally protected activity. Such action was done by defendants in their administrative capacity for which actions they are personally responsible and liable.

30.

On July 8, 1993, the Attorney General issued opinion No. 93-404 which concluded that only the Board could terminate its Executive Director. At no time has the Board taken any action to terminate plaintiff as director. On the contrary, the Board has supported his actions.

31.

On July 15, 1993, the Board wrote the Judicial Administrator and made a formal request that plaintiff be paid. On August 12, 1993, Governor Edwin Edwards wrote the Judicial Administrator, instructing him to reinstate plaintiff on the payroll and to make back payments owed to plaintiff to make him current.

32.

On August 12, 1993, Jerome M. Winsberg, Chief Judge for the Orleans Criminal District Court instructed the Judicial Administrator to reinstate plaintiff on the payroll and

make all back payments current.

33.

On August 17, 1993, a letter was directed to plaintiff, as Executive Director of the Board, from Herbert L. Sumrall, Director, State of Louisiana Department of Civil Service, informing plaintiff that certain employees of the Board should properly be civil service employees and requesting plaintiff to submit certain forms to facilitate their classification.

34.

On August 17, 1993, a vote was taken by the Court not to reinstate plaintiff nor to pay him "his salary or any back payments." Those voting in favor of this motion were Judges Quinlan, Hansen, Johnson, Marullo, Reed, Shea and McKay (his vote, according to the minutes, having been case by Judge Marullo in absentia).

35.

Plaintiff has continued to perform his duties as

Executive Director of the Board, even though he has not been paid, and he reports to his office in the Criminal Court building on a daily basis.

36.

On December 22, 1993, Judge Marullo, in explaining the termination of Cassanova, appeared on television Channel 6, which broadcasts over the New Orleans area and beyond, and stated that plaintiff "... was collecting money from the state in an amount which would cost this court $42,000.00 and didn't want to come to work and he was in Baton Rouge and not here and I think that's a felony and he was a deadhead." Such derogatory comments are untrue, libelous per se and have caused damage to plaintiff.

37.

Plaintiff received no due process in the alleged termination of his employment. Plaintiff was not notified that the question of his employment was to be considered by

defendants prior to their taking action seeking to terminate his employment. Plaintiff was given no opportunity to appear before the Court, respond to questions concerning his employment or present his position or defense to charges raised against him.

38.

The reasons given by defendants for plaintiff's termination and cessation were a pretext. Based on the circumstances of his firing and information provided to plaintiff, it is plaintiff's belief, and he so alleges that defendants, at the urging of Judge Marullo, took retaliatory action to terminate his employment, restrict his access to documents and limit his ability to inform others of questionable practices of public concern because:

A. Cassanova exercised his right to free speech in reporting to appropriate state authorities, namely, the Governor, the Governor's executive counsel, legislative auditor and director of the

Civil Service Commission, questionable personnel, payroll and financial practices which were matters of public concern.

B. Cassanova exercised his right to free speech, the right to peaceably assemble and to petition the Government for a redress of grievances by engaging in the political process by 1) supporting and assisting in the attempted passage of legislation in the Louisiana legislature which affected the Board and Jury Commission and 2) in assisting Board personnel in being classified under state civil service.

C. Cassanova exercised his right to free speech in bringing to the attention of the Court en banc financial and personnel practices which were questionable and were matters of public concern.

D. by investigating the financial and payroll practices of the Board, as controlled by the Court through certain of its members, chiefly, Judge Marullo, Cassanova placed the Court in a position that past and present practices of the Court and certain of its members would be made public and subject the Court and certain of its member to

public scrutiny for the reason that Cassanova was informing persons outside of the Court, including governmental authorities, of questionable financial, personnel and payroll practices, which ere matter of public concern.

39.

Cassanova was wrongfully "terminated" and payments to him "suspended" without lawful cause, by State Judges acting in administrative and not judicial capacities, whom under the color of state law, in the form of state action, intentionally disregarded state and federal law by conduct involving a reckless disregard or callous indifference to Cassanova's rights, and, in doing so, wrongfully damaged plaintiffs.

40.

Cassanova was damaged economically, through the loss of his employment, the deprivation of his income, and the incurring of medical bills. Cassanova was damaged

physically in that he was treated for a suspected heart attack as a result of stress arising from the actions of defendants. As a result of the actions of defendants plaintiffs were damaged emotionally, through mental anxiety an distress, humiliation, disruption of their family life, and financial stress.

41.

The actions of defendants and the consequential damage sustained by thereby giving rise to the following federal and state causes of action:

CAUSES OF ACTION

COUNT ONE

42.

Cassanova adopts Paragraphs 1 – 41 above.

43.

The actions of defendants constitute the deprivation of and violation of Cassanova's constitutional rights as protected

by United Stated Constitution, First and Fourteenth Amendments, Louisiana Constitution's 1974, Article 1, Section 4, in particular the right to free speech, the right to peacefully assemble and to petition the government for redress of grievances, all of which give rise to causes of action under the foregoing articles, and as such are cognizable under 42 U.S. 1983, and the law of Louisiana including Article 1, Section 4, Louisiana Constitution.

COUNT TWO

44.

Cassanova adopts Paragraphs 1–43 above.

45.

The actions of defendants constitute the deprivation of and violation of Cassanova's right to due process of law as protected by the United States Constitution, Fourteenth Amendment, and Louisiana Constitution of 1974, Article 1, Section 2, thereby giving rise to a cause of action under 42

USC Sec. 1983 and the law of Louisiana.

COUNT THREE

46.

Cassanova adopts Paragraphs 1–4 above.

47.

The actions of defendants constitute the deprivation of and violation of Cassanova's privileges and immunities as protected by the United States Constitution, Fourteenth Amendment, and Louisiana Constitution of 1974, Article 1, Sections 3, 5 and 7, thereby giving rise to a cause of action under 42 USC Sec. 1983 and the law of Louisiana.

COUNT FOUR

48.

Cassanova adopts Paragraphs 1–47 above.

49.

The actions of defendants constitute the deprivation of and violation of Cassanova's right as a public employee to be

free and protected from retaliation, reprisals for obeying the law, for cooperating with governmental authorities, for reporting questionable activity to members of the court, the governor's office, the legislative auditor, the Board of Jury Commissioners, the Civil Service Commission and other governmental officials. Those actions of defendants violate the United States Constitution, First and Fourteenth Amendments, Louisiana Constitution of 1974, Article 1, Sections 2, 3, 5, and 7, and also LSA – R.S. 482:1169, thereby giving rise to a cause of action under 42 USC Sec. 1983 and the law of Louisiana.

COUNT FIVE

50.

Cassanova adopts Paragraphs 1–49 above.

51.

Defendants, by seeking to terminate and interfere iwth his position of executive director, chose to treat Cassanova,

a whistleblower, differently from others over whom defendants claimed to have authority, and thus deprived and denied Cassanova of his right to equal protection of the law as guaranteed by the United States Constitution, Fourteenth Amendment and the Louisiana Constitution of 1974, Article 1, Section 3, thereby giving rise to a cause of action under 42 USC Sec. 1983 and the law of Louisiana.

COUNT SIX

52.

Cassanova adopts Paragraphs 1–51 above.

53.

Defendant Frank Marullo has slandered plaintiff, as stated in paragraph 36, giving rise to a cause of action for defamation under Louisiana law.

COUNT SIX A

53A

Plaintiffs include by reference all previous allegations.

Defendatns defamed Noel Casanova because of untrue statements made in the document described in paragraph 28 above and which are:

> "Mr. Cassanova's termination from this position is based upon the following enumerated reasons:
>
> 1) Absenteeism due to his attending Legislative hearings and meetings in Baton Rouge when he should have been in New Orleans;
>
> 2) Failure of performing his duties in the Jury Commission's Office because of his chronic absenteeism;

COUNT SEVEN

54.

Plaintiffs adopt Paragraphs 1–53 above.

55.

Plaintiff, Karen Cassanova, asserts a cause of action because of the damages sustained by her as a result of the unlawful actions of defendants.

COUNT EIGHT

56.

Plaintiffs adopt paragraphs 1–55 above.

57.

Defendants intentionally and tortiously interfered with plaintiff's contractual rights with his employer, The Board of Jury Commissioners for the Parish of Orleans, by instructing the Judicial Administrator to withhold payment of Cassanova's salary for work performed as the Board's Executive Director and for work which he continues to perform.

COUNT NINE

58.

Plaintiffs adopt paragraphs 1–57 above.

59.

The acts of defendants as described herein in ordering the cessation of Cassanova's paycheck for the reasons described above was conduct of such an outrageous nature as to entitle plaintiffs to recover damages.

DAMAGES

60.

The actions of defendants have cause economic and emotional injuries and damages to Noel Cassanova, in sums no less than those set out as follows:

A.	Past wage/salary (award of back pay) from date of termination to anticipated trial date	$ 100,000.00
B.	Present value of future wage/salary lost, including fringe benefits	300,000.00
C.	Pain and suffering, mental anguish and distress, public embarrassment, humiliation and damage to reputation	500,000.00

D. Medical bills, past and future 5,000.00

D. Punitive and exemplary damages 800,000.00

E. Attorney's fees pursuant to 42 USC Sec. 1988 . . . . . 300,000.00

TOTAL DAMAGES . . . . . $ 2,005,000.00

61.

Karen Cassanova has suffered mental anxiety and distress, pain and suffering, physical injury as a result of stress, humiliation and disruption of her family life, and medical bills, all damaging her in the sum of $300,000.00.

62.

Cassanova requests a trial by jury on all appropriate issues.

63.

Cassanova reserves the right to amend and supplementthis Complaint at a later date as additional

information becomes available through discovery. Cassanova reserves the right to name other persons as defendants if discovery reveals that they violated applicable laws.

WHEREFORE, Noel Patrick Cassanova prays for judgment in his favor and against the defendants as solidary obligor as follows:

A. $905,000.00 in actual damages;

B. $800,000.00 in punitive or exemplary damages;

C. $300,000.00 in attorney's fees and other taxable costs;

D. For interest and costs as the law permits;

E. For trial by jury on all appropriate issues; and

F. For all general and equitable relief to which he may be entitled.

Karen Sullivan Cassanova prays for judgment in her favor and against the defendants in solido as follows:

A. $300,000.00 in actual damages;

B. $300,000.00 in punitive or exemplary damages;

C. $300,000.00 in attorney's fees and other taxable costs;

D. For interest and costs as the law permits;

E. For trial by jury on all appropriate issues; and

F. For all general and equitable relief to which he may be entitled.

By Attorneys:

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has

been furnished to the following counsel of record by U.S. Mail, postage prepaid.

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Counsel for Frank A. Marullo, Jr.

Baton Rouge, Louisiana this 29th day of March, 1995.

sig/Charles R. Moore
CHARLES R. MOORE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> **Amendment I -- Freedom Of Religion, Speech And Press; Peaceful Assemblage; Petition Of Grievances**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in part:

> **Amendment XIV -- Citizenship; Privileges And Immunity; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement**
>
> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. §1983 provides:

§1983. Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be a statute of the District of Columbia.

La. C.C. art. 2747 provides:

Art. 2747. Contract of servant terminable at will of parties

A man is at liberty to dismiss a hired servant

attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.

La.C.Cr.Proc. art. 404.1 provides:

Art. 404.1. Powers, duties, and functions of the Board of Jury Commissioners in parishes of 475,000 or more[1]

A. Notwithstanding any other law to the contrary, this article shall apply to the Board of Jury Commissioners in parishes of 475,000 or more in population. In such parishes, there shall be a Board of Jury Commissioners, hereinafter referred to as "the Board", composed of five members appointed by the Governor, subject to confirmation of the Senate, to serve at his pleasure. The Board shall meet at least once every six months and when it is ordered to do so by the Court, and may meet to select or supplement the general venire for grand and petit jurors. Three members shall constitute a quorum. The Board may select a new general venire at any meeting and shall do so when ordered by the Court.

---

[1]Orleans Parish is a parish of 475,000 or more.

B. The Board in such parishes may, with the concurrence of the judges of the Criminal District Court, have subpoenas served through personal or domiciliary service by depositing same in the United States Mail, regular, certified, or registered, addressed to the juror at his usual residence or business address. The date of mailing shall be not less than fifteen days prior to the date on which the addressee is subpoenaed to appear. When service is by regular mail, the Board of Jury Commissioners shall retain a record of the date of mailing. In the case of service by regular mail, or prior to any contempt citation, the person shall be served by registered or certified mail with return receipt requested. If service is made by registered or certified mail with return receipt requested, the return receipt shall be retained by the Jury Commission as proof of proper service and failure of the person to respond to the subpoena so served shall constitute contempt of Court.

C. The municipality which the Board ser ves in such parishes shall cooperate with the Board to provide the Board with records, computer and other equipment, voter registration roles,

tapes, and other items which it needs to compile the general venire of grand jurors and petit jurors at no cost to the Board.

D. The Board in such parishes shall develop a plan to govern its operation. The plan shall be approved by a majority of the judges of the Criminal District Court of such parishes.

E. The Board shall have the authority over all of its employees, subject to the supervision by the Criminal District Court. The Board, by majority vote, shall determine all matters related to its jurisdiction, subject only to the approval of the judges of the District Court or Criminal District Court.

F. The accounting functions of the Board and of the Jury Commission shall be transferred to the Judicial Administrator of the Criminal District Court.

G. All procedures and policies developed by the Jury Commission shall be under the direction and subject to the approval of the Criminal District Court, en banc.

La.C.Cr.Proc. art. 404 provides in part:

Art. 404. Appointment of Jury Commission; Term of Office; Oath;Quorum; Performance of Function in the Parish of East Baton Rouge by the Judicial Administrator; Performance of Function in the Parish of Lafourche by the Clerk of Court

A. Except in the Parish of East Baton Rouge;

(1) the Jury Commission of each parish shall consist of five members, each having the qualifications set forth in Article 401.

(2) In Orleans Parish the Jury Commission shall be appointed by the Governor, and the commissioners shall serve at his pleasure. In other parishes the Jury Commission shall consist of the Clerk of Court or a Deputy Clerk designated by him in writing to act in his stead in all matters affecting the Jury Commission, and four other person appointed by written order of the District Court, who shall serve at the Court's pleasure.

(3) Before entering upon their duties, members of the Jury Commission shall take an oath to discharge their duties faithfully.

(4) Three members of the Jury Commission shall constitute a quorum.

(5) Meetings of the Jury Commission shall be open to the public.

B. and C. [these Subsections apply only to the Parishes of East Baton Rouge and Lafourche and not to the Parish of Orleans. Therefore, they have been omitted from this quotation.]

La. R.S. 15:111 provides:

§ 111. Parish of Orleans; salary of jury commissioners; vacancy; appointment of secretary

Each of the jury commissioners for the Parish of Orleans shall receive a salary of not less than $ 4,200.00 per annum.

The commissioners shall select a secretary of the Board of Jury Commissioners. The Secretary of the Board shall receive a salary of not less than $ 4,000.00 per annum.

The salaries of the jury commissioners and the secretary shall be payable monthly by the City of New Orleans; provided that the City of New Orleans shall be required to budget and continue to pay to the jury commissioners and the secretary the amount presently budgeted and that any increase in the amount of salaries presently paid by the City of New Orleans occasioned by the passage of this bill shall not be effective unless and until ratified and approved by the City Council.

If in the case of absence or inability to act for any cause, there shall be no quorum of the Board of Commissioners the Governor shall appoint commissioners to fill said temporary vacancy or vacancies, who shall have the power of jury commissioner under the Code of Criminal Procedure.